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Plead Guilty, You Could Face Deportation: Seventh Circuit Rules Misadvice and Nonadvice to Non-Citizens Has Same Effect Under the Sixth Amendment

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PLEAD GUILTY, YOU COULD FACE DEPORTATION: SEVENTH CIRCUIT RULES MISADVICE AND NONADVICE TO NON-CITIZENS HAS SAME EFFECT UNDER THE SIXTH AMENDMENT

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INTRODUCTION

The Sixth Amendment of the United States Constitution provides, among other things that, "In all criminal prosecutions, the accused shall enjoy the right . . . *to have the assistance of counsel for his defense*."[1] The "assistance of counsel" clause originally meant that defendants in federal criminal cases had the right to be assisted by

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[1] U.S. CONST. amend. VI (emphasis added) ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense").

their own counsel.[2] It initially only applied to federal cases because the Bill of Rights did not apply to the states until the early 1920s when the Supreme Court started to incorporate those rights using the Due Process Clause of the Fourteenth Amendment.[3] Consequently, there were no Sixth Amendment claims regarding the sufficiency of counsel in federal cases for over a century after the Sixth Amendment was ratified.[4] Many states, however, had assistance-of-counsel statutes in place guaranteeing counsel in certain circumstances, usually for capital cases or indigent defendants.[5] Although there were several successful ineffective assistance of counsel claims brought in state courts,[6] those claims generally failed.[7] However, the state cases that were successful led to widespread acceptance that the right to counsel clause of the Sixth Amendment meant *effective* assistance of counsel.[8]

In 1932, the Supreme Court applied the right to counsel to a state court conviction.[9] In *Powell v. Alabama*, nine African American men were accused of raping two white women.[10] At that time, rape was a capital offense,[11] but the defendants were completely cut off from their families and were never formally appointed counsel.[12] The trial court judge "appointed all the members of the bar for the purpose of arraigning the defendants" and assumed that someone would step in to defend the men.[13] Eventually two lawyers did volunteer to represent

[2] Sanjay K. Chhablani, *Disentangling the Right to Effective Assistance of Counsel*, 60 SYRACUSE L. REV. 1, 5 (2009) (citing Bute v. Illinois, 333 U.S. 640, 661 n.17 (1948)).

[3] *Id.* at 6.

[4] *Id.* at 5.

[5] *Id.* at 6.

[6] *Id.* at 6-7; *see, e.g.*, Roper v. Territory, 33 P. 1014, 1016 (N.M. 1893); People v. Nitti, 143 N.E. 448, 453 (Ill. 1924).

[7] Chhablani, *supra* note 2, at 6-7.

[8] *Id.* at 10.

[9] Powell v. Alabama, 287 U.S. 45 (1932).

[10] *Id.* at 49.

[11] *Id.* at 50.

[12] *Id.* at 49, 52-53.

[13] *Id.* at 49.

the accused men, but were not given time to investigate or prepare a defense.[14] Additionally, the accused were not able to meet with the lawyers before the trials started.[15] The trials lasted only one day each, and all of the men were convicted.[16] All but one of the accused was sentenced to death.[17] The Supreme Court held that the men were "not accorded the right to counsel in any substantial sense"[18] because the lower court's vague appointment precluded any effective assistance to the defendants.[19]

Finally, in 1942 the Supreme Court found that the Sixth Amendment encompassed the right to *effective* assistance of counsel in federal criminal cases in *Glasser v. United States*.[20] Following *Powell* and *Glasser*, the Supreme Court decided several cases concerning effective assistance of counsel, but did not establish a standard for lower courts to determine what was considered "effective."[21] The lack of a standard prompted the lower courts to establish the "farce and mockery" standard to determine ineffective assistance of counsel claims.[22] The "farce and mockery" standard was developed by the Court of Appeals for the District of Columbia, and provided that, to state a claim of ineffective assistance of counsel, the case must shock the conscience "with exceptional circumstances showing the proceedings were a farce and a mockery of justice."[23] This standard posed a significant hurdle for defendants, and reflected courts' presumptions that attorneys were providing satisfactory aid to

[14] *Id.* at 53.

[15] *Id.*

[16] *Id.* at 50.

[17] *Id.* at 50.

[18] *Id.* at 58.

[19] Chhablani, *supra* note 2, at 11.

[20] Glasser v. United States, 315 U.S. 60, 68 (1942).

[21] Chhablani, *supra* note 2, at 13. *See, e.g.*, Hawk v. Olson, 326 U.S. 271 (1945); White v. Ragen, 324 U.S. 760 (1945).

[22] Chhablani, *supra* note 2, at 13-14.

[23] Patrick S. Metze, *Speaking Truth to Power: the Obligation of the Courts to Enforce the Right to Counsel at Trial*, 45 TEX. TECH L. REV. 163, 187 (2012).

clients.[24] Eventually, when analyzing the right to counsel under the Due Process Clause, several states imposed the requirement that prejudice is required to state a claim for ineffective assistance of counsel under the "face and mockery" test.[25] This requirement is significant because "irrespective of how poor counsel's conduct may have been, if the defendant was not harmed, there was no constitutional violation and therefore nothing to guide future conduct."[26] The lower courts moved from the "farce and mockery" test under the Due Process Clause to the reasonable competence test under the Sixth Amendment in the 1970s.[27] The reasonable competence test provides that "trial counsel fails to render effective assistance when he does not exercise the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances."[28] The "farce and mockery" test was increasingly found to be too high a burden for defendants making out ineffective assistance of counsel claims.[29] The reasonable competence test was supposed to be more lenient than the previous test; however, many circuit courts concluded the two standards were basically the same.[30]

The right to effective assistance of counsel is imperative in protecting the fundamental right to a fair trial.[31] An attorney's expertise is necessary to provide defendants with an opportunity to defend their case.[32] This is why the Supreme Court interpreted the Sixth Amendment to mean that criminal defendants have the right to be appointed counsel if they cannot retain their own.[33] However, an

[24] Chhablani, *supra* note 2, at 15.

[25] *See, e.g.*, United States v. Lovasco, 431 U.S. 783, 790 (1977).

[26] Chhablani, *supra* note 2, at 17.

[27] *Id.* at 20-21.

[28] Trapnell v. United States, 725 F.2d 149, 155 (2d Cir. 1983) (quoting United States v. Easter, 539 F.2d 663, 666 (8th Cir. 1976)).

[29] Chhablani, *supra* note 2, at 23-24.

[30] *Id.* at 22, 24.

[31] Strickland v. Washington, 466 U.S. 668, 685 (1984).

[32] *Id.*

[33] *Id. See also* Argersinger v. Hamlin, 407 U.S. 25 (1972).

attorney's presence is not all that is required by the Constitution.[34] An attorney's presence *and* assistance is necessary to ensure that the defendant receives a fair trial.[35] The *Gideon v. Wainwright* decision suggests that "counsel must provide clients with advice about substantive legal issues and the intricacies of criminal procedure and must serve as advocates, guiding clients in the strategic and tactical decision making involved in trials."[36] By rendering ineffective assistance of counsel, an attorney deprives a defendant of his or her Sixth Amendment Constitutional right.[37] Finally, in 1984, the Supreme Court decided *Strickland v. Washington*.[38] *Strickland* laid out a framework now used for determining what constitutes ineffective assistance of counsel.[39]

Until 2010, Sixth Amendment ineffective assistance of counsel claims were analyzed under the two-prong test laid out in *Strickland*.[40] Under *Strickland*, a defendant must show: (1) ineffective counsel whose conduct fell below an objective standard of reasonableness, and (2) that counsel's deficient performance resulted in prejudice to the defense.[41] In other words, to state a claim under *Strickland*, a lawyer's mistakes must be so serious that the defendant is deprived of a fair trial.[42]

The first prong of *Strickland* is analyzed using a reasonableness standard.[43] Courts look at "prevailing professional norms"[44] to

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[34] *Id.*

[35] *Id.*

[36] Chhablani, *supra* note 2, at 17 (discussing the Supreme Court's holding in Gideon v. Wainwright, 372, U.S. 335 (1963), that not providing counsel deprives defendants' access to counsel's expertise, and thus the shot at a fair trial).

[37] Strickland, 466 U.S. at 686.

[38] *Id.*

[39] *Id.* at 674.

[40] *Id.* at 687-88.

[41] *Id.* at 687.

[42] *Id.*

[43] Padilla v. Kentucky, 559 U.S. 356, 366 (2010).

[44] *Id.*

determine whether an attorney's actions are reasonable. There is a strong presumption in favor of attorneys' reasonableness.[45] To satisfy the second prong of *Strickland*, a defendant must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[46]

Although criminal defendants are guaranteed the *effective* assistance of counsel,[47] courts have limited that right through use of the collateral consequences doctrine.[48] The collateral consequences doctrine is used to determine the circumstances in which a criminal defendant may challenge his counsel's effectiveness under the Sixth Amendment.[49] However, the Supreme Court has never used the doctrine in its analysis of Sixth Amendment claims.[50] Most federal and state courts have determined that the Sixth Amendment right to effective assistance of counsel applies only to direct, not collateral, consequences of a criminal conviction.[51] The difference between direct and collateral consequences is often hard to discern.[52] Generally, direct consequences are defined as "definite, immediate and largely automatic effect[s] on the range of a defendant's punishment."[53] Examples of direct consequences include criminal punishments such as jail time, probation, imprisonments, and fines.[54] On the other hand, collateral consequences are civil sanctions, as opposed to penal

[45] Chhablani, *supra* note 2, at 35.

[46] *Id.* (quoting *Strickland*, 466 U.S. at 694).

[47] *See* Hill v. Lockhart, 474 U.S. 52, 56-58 (1985) (The Supreme Court held that criminal defendants are guaranteed the right to effective assistance of counsel when pleading guilty under the Sixth Amendment).

[48] Allison C. Callaghan, *Padilla v. Kentucky: A Case for Retroactivity*, 46 U.C. DAVIS L. REV. 701, 708 (2012).

[49] *Id.*

[50] *Padilla*, 559 U.S. at 365 ("We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*.").

[51] Callaghan, *supra* note 48 at 708.

[52] *Id.* (internal quotation marks omitted).

[53] Callaghan, *supra* note 48, at 708.

[54] *Id.* at 708-709.

sanctions.[55] Collateral consequences commonly "[stem] from the fact of conviction, rather than the explicit punishment issued by the court."[56] In other words, they are "indirect consequences" of criminal convictions.[57] These consequences affect the convicted individual's civil, political, social, and economical rights.[58] Thus, deportation is considered a collateral consequence, as it is borne out of a criminal conviction.[59] Consequently, up until 2010, Sixth Amendment ineffective assistance of counsel relief was not available to noncitizen criminal defendants on the basis of non-advice or misadvice concerning deportation.[60]

In 2010, the Supreme Court decided *Padilla v. Kentucky*. In *Padilla*, the Court determined that deportation has a distinct nature, which warrants special consideration under the first prong of the *Strickland* test.[61] Under *Padilla*, an attorney must advise a noncitizen client of the risk of deportation when they are considering taking a plea deal.[62] This is partially due to the fact that "deportation is a

[55] *Id.* at 709.

[56] *Id. See also* Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 699-700 (2002) (comparing the effects of direct consequences to those of collateral consequences).

[57] Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U.L. REV. 623, 634 (2006) (citing Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry into Criminal Defense Lawyering*, 31 FORDHAM URB. L.J. 1067, 1073 (2004)).

[58] Callaghan, *supra* note 48 at 709 (citing Margaret E. Finzen, *Systems of Oppression: The Collateral Consequences of Incarceration and Their Effects on Black Communities*, 12 GEO. J. ON POVERTY L. & POL'Y 299, 307-08 (2005)).

[59] *Id.*

[60] Chin & Holmes, *supra* note 56 at 706-708 (2002) (listing jurisdictions that have held defense counsel only need to explain direct consequences of a conviction to satisfy the Sixth Amendment)).

[61] Padilla v. Kentucky, 559 U.S. 356, 365 (2010).

[62] *Id.*

particularly severe penalty."[63] It is also due to the "intimate connection between criminal convictions and the resulting, nearly mechanical, civil penalty of deportation."[64]

The extreme importance of the *Padilla* rule is highlighted by the changes in the United States' immigration law.[65] Traditionally, there were few types of offenses that resulted in deportation.[66] However, as immigration reform has become more prevalent, more types of offenses have become deportable, making it necessary to allow noncitizen's potential relief under the Sixth Amendment.[67] Now, noncitizens face an increased likelihood of being deported after a criminal conviction because of the evolution of immigration law and the virtually nonexistent discretionary relief that once existed in our laws.[68]

At the outset of the United States, immigration was widespread and unhampered.[69] Even early attempts to regulate deportation of potentially dangerous immigrants were met with disapproval.[70] As time progressed, Congress began to enact statutes regulating immigration, such as prohibiting people convicted of felonies from entering the United States.[71]

Immigration law changed entirely when Congress passed the Immigration Act of 1917.[72] Before 1917, immigration law dealt with

[63] *Id.* (quoting Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893) (internal quotation marks omitted)).

[64] Callaghan, *supra* note 48, at 711.

[65] *Padilla*, 559 U.S. at 364.

[66] *Id.* at 360.

[67] *Id.*

[68] *See id.* at 363.

[69] *Id.* at 360 (citing C. Gordon & H. Rosenfield, Immigration Law and Procedure § 1.(2)(a), pg. 5 (1959)).

[70] *See, e.g., id.* (discussing the unpopularity of the Act of June 25, 1978, ch. 58, 1 Stat. 571, which allowed the President the power to deport immigrants "he judge[d] dangerous to the peace and safety of the United States.").

[71] *Id.* (discussing early immigration laws passed by Congress).

[72] *Id.* at 361 (citing S. Rep. No. 151, 81st Cong., 2d Sess., 54-55 (1950)).

preventing certain people from immigrating to the United States,[73] as opposed to removing existing immigrants from the United States. The Immigration Act of 1917 made convictions for crimes involving moral turpitude deportable offenses for the first time.[74]

While the Act did allow for deportations, it also had procedural safeguards for immigrants.[75] Judges were able to make recommendations either at sentencing or within 30 days that certain noncitizens be exempt from deportation.[76] This safeguard was meant to prevent unjust deportations.[77] Although they were termed "judicial *recommendations* against deportation,"[78] these recommendations in practice were binding and the Act was "consistently . . . interpreted as giving the sentencing judge conclusive authority to decide whether a particular conviction should be disregarded as a basis for deportation."[79] Judicial discretion, combined with Congress's failure to define "moral turpitude," meant that there was no automatic deportation for any offense.[80]

Starting in 1952 with the 1952 Immigration and Nationality Act, Congress began to eliminate the discretionary power of judges to recommend that certain "aliens" not be deported.[81] By 1990, Congress had completely eliminated the judicial discretionary power.[82] Continuing this pattern, Congress next disposed of a similar

[73] *Id.* at 360-61 (noting statutes passed prior to 1917 banned convicts, prostitutes, and those who committed crimes involving moral turpitude from entering the country).

[74] *Id.* at 361 ("Section 19 of the 1917 Act authorized the deportation of 'any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States . . . .'").

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.* at 361-62 (emphasis added).

[79] *Id.* at 362 (quoting Janvier v. United States, 793 F.2d 449, 452 (CA2 1986)).

[80] *Id.*

[81] *Id.* at 363.

[82] *Id.* (citing 104 Stat. 5050).

discretionary power held by the Attorney General in 1996.[83] The Attorney General had used that power to help over 10,000 noncitizens avoid deportation between 1991 and 1995.[84] Since the 1996 law, deportation is virtually certain for noncitizens that commit deportable offenses.[85] Because of this virtual certainty, and the "drastic measure" of deportation[86], it is imperative that attorneys inform their noncitizen clients of the risks of pleading guilty to criminal offenses.

First, this Comment will discuss the history of Sixth Amendment ineffective assistance of counsel claims, specifically with regard to deportation. Next it will discuss the Seventh Circuit's decision, *Chavarria v. United States*, which addresses misadvice and non-advice to noncitizens about deportation risks associated with plea bargains. Finally, this Comment will argue that the Seventh Circuit correctly decided *Chavarria* in light of the Supreme Court's decisions in *Padilla v. Kentcuky* and *Chaidez v. United States*, though the outcome is contrary to the intent of *Padilla*.

BACKGROUND

This background section provides an overview of the cases leading up to the Seventh Circuit's decision in *Chavarria v. United States*. It begins with the Supreme Court case *Padilla v. Kentucky*, which established a distinct rule for Sixth Amendment right to effective assistance of counsel in criminal cases involving noncitizens. It then discusses the effect of *Padilla* and the resulting circuit split.[87] Finally, this section will discuss the Seventh Circuit's decision in

[83] *Id.* (citing 110 Stat. 3009-596).

[84] *Id.* (citing INS v. St. Cyr, 533 U.S. 289, 296, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001)).

[85] *Id.* at 363-364.

[86] *Id.* at 360.

[87] Callaghan, *supra* note 48 at 716 (noting "more than twenty-eight federal courts and sixteen state courts have reached opposing conclusions regarding whether *Padilla* is retroactively applicable"); *see also id.* at note 89 (listing district and state court cases which reached opposing results regarding *Padilla's* retroactivity).

Chaidez v. United States and the Supreme Court's subsequent affirmation.

A. Padilla v. Kentucky established that attorneys must inform their noncitizen clients about the risks of deportation associated with plea-bargaining.

In 2010, the Supreme Court greatly impacted immigration law with its decision in *Padilla v. Kentucky*. The Petitioner, Jose Padilla, was born in Honduras, but had been living in the United States for over 40 years at the time of his arrest and even served as a soldier in the Vietnam War.[88] He was arrested when he was found to be transporting marijuana in his tractor-trailer in Kentucky.[89] Padilla pled guilty to the drug charges on his attorney's advice.[90] The charge he faced unambiguously provided,

> Any alien who at any time after admission has been convicted of a violation of (or a conspiracy to or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . , other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.[91]

His guilty plea to the drug charges meant that he would almost certainly face deportation, despite his attorney informing him that he "did not have to worry about immigration status since he had been in the country so long."[92] Padilla alleged he would have proceeded to trial had he been advised of the consequences of his plea bargain.[93] Indeed, the Court noted that "[p]reserving the client's right to remain

[88] *Padilla*, 559 U.S. at 359.
[89] *Id.*
[90] *Id.*
[91] *Id.* at 368 (quoting 8 U.S.C. § 1227 (a)(2)(B)(i)).
[92] *Id.* at 359 (internal quotation marks omitted).
[93] *Id.*

in the United States may be more important to the client than any potential jail sentence."[94] The petitioner in *Padilla* claimed ineffective assistance of counsel in violation of his Sixth Amendment rights because his attorney told him that pleading guilty to drug distribution charges would not affect his immigration status.[95] The Supreme Court of Kentucky determined that Padilla was not entitled to post-conviction relief because the Sixth Amendment does not protect criminal defendants from collateral consequences of convictions.[96] Since the Supreme Court of Kentucky deemed deportation a collateral consequence rather than a direct one, it found that the Sixth Amendment did not apply to Padilla's claim.[97]

The Supreme Court faced the issue of whether Jose Padilla's attorney had the duty to inform him that guilty plea he was accepting for the drug charges would lead to his deportation. Unlike the Supreme Court of Kentucky, the Supreme Court found that deportation possesses a unique nature, which makes it incompatible with the collateral consequence doctrine.[98] The Court therefore concluded that advice concerned with deportation falls under the Sixth Amendment's guarantee of effective assistance of counsel under *Strickland*.[99] Therefore, the Court held that counsel must inform a client about the risk of deportation when advising on matters concerning criminal convictions.[100]

The Supreme Court began by analyzing Padilla's claim using the *Strickland* two-part test. It found that "[t]he weight of prevailing professional norms supports the view that counsel must advise her

[94] *Id.* at 368 (quoting St. Cyr, 533 U.S. 289, 322 (2001) (internal quotation marks omitted)).

[95] Chaidez v. United States (*"Chaidez I"*), 655 F.3d 684, 687 (7th Cir. 2011), *aff'd*, 133 S. Ct. 1103 (2013).

[96] *Id.* at 359.

[97] *Id.* at 365.

[98] *Id.* at 366.

[99] Callaghan, *supra* note 48 at 711 (citing *Padilla*, 559 U.S. at 367).

[100] *Id.*

client regarding the risk of deportation."[101] Additionally, given the clarity of the statute that Padilla was charged under, it would have been simple for his attorney to conclude that pleading guilty would result in deportation.[102] Padilla demonstrated that his attorney's conduct fell below an objectively reasonable standard[103] and, therefore, satisfied the first prong of *Strickland*.[104] The Court did not, however, determine if Padilla was entitled to relief under the new rule because they did not reach the second prong of *Strickland*.[105]

The Supreme Court held that lawyers for noncitizens must inform their clients whether accepting a plea bargain risks deportation.[106] Ultimately, the Court declared that the noncitizen claiming ineffective assistance of counsel under this new rule must show prejudice,[107] such as a showing that he or she would not have pled guilty knowing the risks involved, for example.[108]

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[101] *Padilla*, 559 U.S. at 367 (citing NATIONAL LEGAL AID AND DEFENDER ASSN., PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION § 6.2 (1995); G. HERMAN, PLEA BARGAINING § 3.03, pp. 20-21 (1997); Chin & Holmes, *supra*, note 56, at 713-718; A CAMPBELL, LAW OF SENTENCING § 13:23 pp. 555, 560 (3d ed. 2004); DEPT. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, 2 COMPENDIUM OF STANDARDS FOR INDIGENT DEFENSE SYSTEMS, STANDARDS FOR ATTORNEY PERFORMANCE, pp. D10, H8-H9, J8 (2000) (providing survey of guidelines across multiple jurisdictions); ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION 4-5.1(a), p. 197 (3d ed. 1993); ABA STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY 14-3.2(f), p. 116 (3d ed. 1999)).

[102] *Id.* at 368-69.

[103] *Id.* at 367 ("The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation.").

[104] *Id.* at 369.

[105] *Id.* at 360.

[106] *Id.* at 374.

[107] *Id.* at 360.

[108] 24-611 Moore's Federal Practice – Criminal Procedure § 611.06, pg. 11.

B. Chaidez I: The Seventh Circuit determined that the Padilla rule did not apply retroactively.

After *Padilla*, the lower courts were split on whether *Padilla's* rule would apply retroactively.[109] In *Chaidez v. United States*, the petitioner moved to the United States from Mexico and became a lawful permanent resident in 1977.[110] In 2003, Petitioner-Chaidez was indicted on three counts of mail fraud and pled guilty on the advice of counsel.[111] Chaidez was sentenced to four years of probation in 2004, which she did not appeal.[112] In 2009, the government began removal proceedings against Chaidez[113] based on a federal law that allows for deportation of aliens convicted of aggravated felonies after entering the United States.[114]

After deportation proceedings were initiated against her, Chaidez tried to overturn her conviction.[115] In 2010, she filed a writ of coram nobis,[116] in which she alleged ineffective assistance of counsel because

[109] *See e.g.*, Chaidez v. United States (*"Chaidez I"*), 655 F.3d 684, 687 (7th Cir. 2011); *see also* United States v. Orocio, 645 F.3d 630, 2011 WL 2557232, at *7 (3d Cir. June 29, 2011) ("holding that [*Padilla*] simply applied the old [*Strickland*] rule, such that it is retroactively applicable on collateral review"); United States v. Diaz-Palmerin, 2011 U.S. Dist. LEXIS 37151 (N.D. Ill. April 5, 2011) (stating that *Padilla* did not apply a new rule); Martin v. United States, 2010 U.S. Dist. LEXIS 87706 (C.D. Ill. Aug. 25, 2010) (stating that *Padilla* did not apply a new rule); United States v. Chavarria, 2011 U.S. Dist. LEXIS 38203, 2011 WL 1336565 (N.D. Ind. April 7, 2011) (stating that *Padilla* did not apply a new rule). *But see* United States v. Laguna, 2011 U.S. Dist. LEXIS 38856, 2011 WL 1357538 (N.D. Ill. April 11, 2011) (*Padilla* announced a new rule).

[110] *Chaidez I*, 655 F.3d at 686.

[111] *Id.*

[112] *Id.*

[113] *Id.* (Chaidez's mail fraud constituted an aggravated felony because it involved loss in excess of $10,000).

[114] 8 U.S.C. § 1227(a)(2)(A)(iii).

[115] *Chaidez I*, 655 F.3d at 686.

[116] *Id.* at 686-87 ("The writ of coram bonis, available under the All Writs Act, 28 U.S.C. § 1651(a), provides a method for collaterally attacking a criminal

her attorney did not warn her that she could be deported as a result of her guilty plea.[117] The Supreme Court decided *Padilla* while Chaidez's motion was pending. The district court determined that *Padilla* was not a new rule so it applied *Padilla* to Chaidez's motion and vacated her conviction.[118] The government appealed that decision and claimed that *Padilla* did announce a new rule and is therefore not retroactive.[119]

The Seventh Circuit analyzed *Chaidez I* under *Teague v. Lane*, which determined whether constitutional rules of criminal procedure are retroactive.[120] Under the *Teague* analysis, "a constitutional rule of criminal procedure applies to all cases on direct and collateral review if it is not a new rule, but rather an old rule applied to new facts," whereas a new rule generally only applies to cases on direct review. [121] A rule is new when it lacks precedential support at the time the defendant's conviction is final.[122] In sum, the *Teague* analysis looks (1) to when the defendant's conviction became final; (2) to whether there was agreement among courts before the new rule was announced; and (3) if the rule is determined to be new, whether one of two exceptions to non-retroactivity apply.[123] The first exception allows a new rule retroactive effect if "it addresses a substantive categorical guarantee accorded by the Constitution."[124] The second exception applies if "fundamental fairness and accuracy of the criminal proceeding" is involved.[125]

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conviction when a defendant is not in custody, and thus cannot proceed under 28 U.S.C. § 2255.").

[117] *Id.* at 686.

[118] *Id.*

[119] *Id.*

[120] *Id.* at 688 (citing Whorton v. Bockting, 549 U.S. 406, 416 (2007)).

[121] *Id.*

[122] *Id.* (quoting Teague v. Lane, 489 U.S. 288, 301 (1989)).

[123] Callaghan, supra note 48, at 713.

[124] *Id*. at 714-715.

[125] *Id.* at 715.

To determine retroactivity, the court inquired if *Padilla* was subject to "debate among reasonable minds."[126] Reasonable debate may be indicated by lower courts being split on the issue or lack of unanimity on the Supreme Court in deciding the case.[127] Based on this, the Seventh Circuit determined that the *Padilla* rule was a new rule.[128] It discussed the fact that the *Padilla* opinion had both a concurrence and dissent, in addition to the majority suggesting that the rule was not "dictated by precedent."[129] The court also noted that the definition of an old rule is defined narrowly, only including "those holdings so compelled by precedent that any contrary conclusion must be deemed unreasonable."[130] Further, it cites the handling of pre-*Padilla* Sixth Amendment cases, which only required attorneys to provide advice on direct consequences of guilty pleas.[131] Since it determined *Padilla* did not announce a new rule under the *Teague* analysis, the Seventh Circuit reversed the lower court's decision to vacate Chaidez's conviction.

C. Chaidez II: The Supreme Court affirms the Seventh Circuit holding that Padilla is not retroactive.

The Supreme Court granted certiorari in the Seventh Circuit's case, *Chaidez I* to resolve the circuit split regarding *Padilla's* retroactivity. Many believed that the Supreme Court would find the *Padilla* rule to be retroactive, based on the language used in the *Padilla* decision.[132] The Court acknowledged the government's concern with keeping convictions from plea-bargaining final, but

[126] *Chaidez I*, 655 F.3d at 688.

[127] *Id.* at 689.

[128] *Id.*

[129] *Id.*

[130] *Id.* at 694.

[131] *Id.* at 690.

[132] *See, e.g.*, Callaghan, *supra* note 48; N.Y. Times, *Subject to Deportation*, N.Y. TIMES OPINION PAGES, Nov. 1, 2012, *available at* http://www.nytimes.com/2012/11/02/opinion/the-supreme-court-on-deportation-law.html?_r=0.

rejected this concern.[133] It stated that the rule would not "open the floodgates to challenges obtained through plea bargains."[134]

Contrary to that belief, the Supreme Court found that *Padilla* is a new rule, and thus not retroactive.[135] The Court reasoned that while usually applications of *Strickland* to new facts did not create new rules, *Padilla* did something more than simply apply the *Strickland* test.[136] *Padilla* first determined if *Strickland* even applied to deportation.[137] *Padilla* rejected what lower courts seemed to agree on: that deportation is a collateral consequence and is thus out of reach of the Sixth Amendment.[138] Given the decisions of the lower courts, and *Padilla's* rejection of those decisions, the Supreme Court determined, using *Teague*, that the *Padilla* rule was indeed new as it was "not apparent to all reasonable jurists prior to our decision."[139] The Seventh Circuit's *Chaidez I* decision was affirmed.[140]

CHAVARRIA V. UNITED STATES

This section will discuss the Seventh Circuit's decision in *Chavarria v. United States* when it determined whether there was a distinction between misadvice and nonadvice for purposes of the rule set forth in *Padilla v. Kentucky*.

[133] Padilla v. Kentucky, 559 U.S. 356, 358 (2010).

[134] *Id.* at 371.

[135] Chaidez v. United States ("*Chaidez II*"), 133 S. Ct. 1103, 1108 (2013).

[136] *Id.*

[137] *Id.*

[138] *Id.* at 1111.

[139] *Id.* (quoting Lambrix v. Singletary, 520 U.S. 518 , 527-528 (1997) (internal quotation marks omitted)).

[140] *Id.*

A. Factual History

Julio Cesar Chavarria was born in Mexico, but became a resident of the United States in 1982.[141] Chavarria was charged with four counts of distributing cocaine in 2009.[142] He pled guilty to the charges.[143] After Chavarria's plea, the Supreme Court decided *Padilla v. Kentucky*.[144] After *Padilla* was announced, Chavarria filed a pro se motion based on 28 U.S.C. § 2255.[145]

Chavarria purported that when he inquired about deportation, his attorney responded that he did not need to worry about removal as the Bureau of Immigration and Customs Enforcement "said they were not interested in deporting him."[146] Chavarria also filed a Petition to Stay Deportation Proceedings, but was deported before he could be appointed an attorney.[147]

B. Procedural History

The United States attempted to dismiss Chavarria's § 2255 motion, arguing that the Supreme Court's *Padilla* decision created a new, proactive rule.[148] The district court denied the United States' motion to dismiss, holding that the *Padilla* rule could be applied retroactively.[149]

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[141] Chavarria v. United States, 739 F.3d 360, 361 (7th Cir. 2014).

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.* A motion filed under 28 U.S.C. § 2255 is a motion to vacate, set aside or correct a sentence. It is only available to those serving a federal sentence. See the federal form *Motion to Vacate, Set Aside, or Correct a Sentence By a Person in Federal Custody*, *available at* http://www.uscourts.gov/uscourts/FormsAndFees/Forms/AO243.pdf).

[146] *Chavarria*, 739 F.3d at 361 (internal quotation marks omitted).

[147] *Id.*

[148] *Id.*361-62.

[149] *Id.* at 362.

Following the district court's decision, the Seventh Circuit decided *Chaidez I* in 2011, holding that *Padilla* was a new rule and thus, not to be applied retroactively.[150] Based on the *Chaidez I* ruling, the district court vacated its previous ruling and dismissed Chavarria's § 2255 motion.[151] Chavarria then appealed the district court's ruling, as well as the Seventh Circuit's *Chaidez* decision.[152] Unfortunately for Chavarria, in the meantime, the Supreme Court granted certiorari in *Chaidez I* and affirmed the Seventh Circuit's holding that the *Padilla* case issued a new rule, thereby barring retroactivity.[153]

Since the Supreme Court's affirmation of *Chaidez I* eliminated his retroactivity argument, Chavarria next argued that there is a distinction between non-advice and misadvice.[154] Chavarria claimed that if an attorney does not provide any advice regarding deportation consequences, the new, proactive *Padilla* rule applies.[155] However, if the attorney provides misadvice, or bad advice, "pre-*Padilla* law" applies.[156] Essentially, Chavarria was claiming that *Padilla* does not apply to his case, therefore making it irrelevant that *Padilla* was found not to apply retroactively.[157] Rather, he claimed his case, like all other affirmative misrepresentation claims, should have ben analyzed under *Strickland*.[158] Chavarria based this argument on several other circuit court decisions, which held that "pre-*Padilla*, misstatements about deportation could support an ineffective assistance claim."[159] The court rejected this because those cases merely found that a lawyer

[150] *Id.* (*See* Chaidez v. United States, 655 F.3d 684 (7th Cir. 2011), *aff'd*, 133 S. Ct. 1103 (2013)).

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] *Id.* (stating "[t]rue enough, three federal circuits . . . held before Padilla that misstatements about deportation could support an ineffective assistance claim.") (citing Chaidez v. United States ("*Chaidez II*"), 133 S. Ct. 1103, 1112 (2013).

could not mislead his client on anything significant relating to a criminal prosecution.[160]

C. Seventh Circuit's Conclusion

The Seventh Circuit was not persuaded by Chavarria's distinction between misadvice and non-advice.[161] First, it cites to *Padilla*, noting that the Supreme Court made no distinction between the two terms.[162] Since the Court did not distinguish misadvice from non-advice, that indicated to the Seventh Circuit that the rule applied to all forms of advice concerning deportation matters.[163]

Next, it concluded that under *Teague v. Lane*, the precedent before *Padilla* "supporting the application of *Strickland* in this context" was insufficient.[164] Under *Teague v. Lane*, for a rule to be applied retroactively, it must "be supported by ample existing precedent."[165] As it mentioned in *Chaidez I*, lower courts consistently found deportation to be a collateral consequence in pre-*Padilla* days, therefore indicating lack of precedent.[166]

Finally, the Seventh Circuit noted that the facts of *Padilla v. Kentucky* relating to the lawyer's advice were essentially the same as the facts that Chavarria alleges.[167] In other words, in both cases, the attorneys allegedly provided their immigrant clients with *faulty advice* concerning their removal risks. In *Padilla*, the attorney advised his noncitizen client that he would not be deported because he had been in the country for over 40 years.[168] The Seventh Circuit stated, ". . .

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[160] *Id*. (quoting *Chaidez II*, 133 S. Ct. at 1112).

[161] *Id.*

[162] *Id.*

[163] *Id.* at 362-63.

[164] *Id*. at 362 (citing Teague v. Lane, 489 U.S. 288, 301 (1989)).

[165] *Id.* (citing Teague v. Lane, 489 U.S. at 301).

[166] Chaidez v. United States ("*Chaidez I*"), 655 F.3d 684, 691-692 (7th Cir. 2011).

[167] *Chavarria*, 739 F.3d at 363.

[168] Padilla v. Kentucky, 559 U.S. 356, 359 (2010).

Chavarria is essentially asking us to hold that *Chaidez* held that the *Padilla* rule is not retroactive *except* on *Padilla's* own facts (which involved misadvice)."[169] Consequently, it would not make sense to hold that the new rule created in *Padilla* does not apply to the facts of *Chavarria*.[170]

ANALYSIS

The Seventh Circuit correctly decided *Chavarria v. United States* because (1) the Supreme Court never made a distinction between misadvice and nonadvice; and (2) Chavarria's argument fails on *Padilla's* facts. However, although *Chavarria* was decided in accordance with precedent, the outcome of *Chaidez* has led to results that are contrary to *Padilla's* true purpose.

A. The Seventh Circuit correctly decided Chavarria v. United States based on the Chaidez v. United States precedent and the facts of Padilla.

1. The Supreme Court never made a distinction between misadvice and non-advice.

In *Padilla*, the Supreme Court never drew a line between misadvice and non-advice.[171] The Seventh Circuit attributes this to the fact that prior to *Padilla*, non-citizens could not bring any Sixth Amendment claims with regard to deportation matters;[172] that type of claim would fail *Strickland's* first prong. Therefore, there was no need to distinguish between midadvice and non-advice because either way, there was no claim recognized under the Sixth Amendment analysis.[173]

[169] *Chavarria*, 739 F.3d at 363.
[170] *Id.* at 363.
[171] *See Padilla*, 559 U.S. at 356.
[172] *Chavarria*, 739 F.3d at 363.
[173] *Id.*

Not only that, but the Supreme Court affirmatively declined to limit their holding in *Padilla* to misadvice because of the absurdities that would result.[174]

Further, as the Seventh Circuit pointed out, the Court in *Chaidez II* referred to both affirmative misadvice and non-advice in its opinion.[175] In *Chaidez II*, the Court, when discussing the distinction between collateral and direct consequences states, "it should not exempt from Sixth Amendment scrutiny a lawyer's advice (or non-advice) about a plea's deportation risk."[176] Thus, the Supreme Court has twice failed to recognize the difference between misadvice and non-advice in regards to cases concerning deportation. This showed "the *Padilla* majority had no intent to exclude either affirmative misadvice or non-advice from the new rule it announced."[177]

Given that the defendant in *Padilla* was given incorrect advice regarding his removal by his attorney, the Seventh Circuit's holding in *Chavarria* is correct. If the court decided the other way, lower courts would be forced to make an attenuated distinction between misadvice and nonadvice, which would be a very fine line in some circumstances. For example, if an attorney merely mentioned to his client that he or she would not be deported, that could arguably be construed as misadvice, or non-advice, if the client had no knowledge of the risk of deportation. If there was a distinction between the two, under Chavarria's argument, a court would have to decide what type of advice the attorney gave which would then determine if that client could bring a Sixth Amendment claim. Courts should not be forced to make this distinction, and furthermore, *Padilla* does not require it. Even in cases like *Chavarria* where there is a clear-cut answer and the attorney's advice falls squarely into either misadvice or non-advice, some noncitizens would be barred from bringing a Sixth Amendment

[174] *Id.* (citing *Padilla*, 559 U.S. at 370-71).

[175] *Id.* (citing Chaidez v. United States ("*Chaidez II*"), 133 S. Ct. 1103, 1110 (2013)).

[176] *Chaidez II*, 133 S. Ct. at 1110.

[177] *Chavarria*, 739 F.3d at 363.

claim at all given that *Strickland* has never been applied to deportation matters.

Additionally, if the Seventh Circuit had held the other way and determined that there is a distinction between misadvice and non-advice for purposes of the *Padilla* rule, it would either give the rule a retroactive effect or impermissibly extend *Strickland* to deportation matters. This is because people who had been deported prior to 2010 would be able to bring *Padilla* claims based on their lawyer's misadvice. This would obviously contradict the explicit holding in the *Chaidez* decision, and could potentially result in the flood of litigation the government was concerned with in *Padilla*.[178]

2. Chavarria's argument that Padilla does not apply to his case fails on the facts of Padilla.

The Seventh Circuit's second reason for rejecting Chavarria's claim was based on the facts of both *Chavarria* and *Padilla*. Chavarria argued that the *Padilla* rule did not apply to his case because he received affirmative misadvice whereas the *Padilla* rule applies only to non-advice.[179] Recall that in both *Padilla* and *Chavarria*, the petitioners were both informed by their respective attorneys that the government was not interested in deporting them.[180] Later, after pleading guilty, both defendants in each case were deported.[181] Therefore, the *Padilla* decision was based on Padilla's attorney's misadvice.[182] It would be absurd for the Seventh Circuit to find that the *Padilla* rule does not apply to *Padilla's* facts.

[178] *But see Padilla*, 559 U.S. at 371 (stating that *Padilla* will not have a significant effect on plea-bargains that have already been obtained).

[179] *Chavarria* 739 F.3d at 362.

[180] *See Padilla*, 559 U.S. at 359; *Chavarria*, 739 F.3d at 361.

[181] *Padilla*, 559 U.S. at 359; *Chavarria*, 739 F.3d at 361.

[182] *Chavarria*, 739 F.3d at 363.

3. The precedent set by *Chaidez v. United States* has led to unfair results that are contrary to the intent of *Padilla.*

Although the Seventh Circuit basically had to decide *Chavarria* in the way that it did, the outcome still led to an absurd result. First, *Chavarria's* result is odd when compared to *Padilla* itself. The Seventh Circuit noted the similarities in the facts between *Chavarria* and *Padilla*, which would lead one to assume that the cases would require the same result. However, Julio Cesar Chavarria was denied a claim under the Sixth Amendment, despite allowing Jose Padilla a claim (assuming he passed the second prong of *Strickland*). Although the Supreme Court did determine the *Padilla* rule to be a new rule and therefore not retroactive,[183] it seems odd that it would intend for the opposite result in such a strikingly similar case. The outcome of *Chavarria* is directly contrary to that of *Padilla*. This discrepancy is especially strange in light of the purpose of the *Padilla* rule, which is to give non-citizens the constitutional protections of the Sixth Amendment because of the "harsh" nature of deportation.[184] This interferes with the intent of *Padilla*. Given the extensive immigration background the Court gave, along with the recitation of immigration law norms, there can be no doubt the Court intended to give Sixth Amendment constitutional rights to immigrants.

Further, the language of *Padilla* reads as if the Court intended for it to be retroactive.[185] This is likely at least part of the cause of the circuit split regarding its retroactivity.[186] One author even argues that the discussion concerning "floodgates" in *Padilla* would be irrelevant if the decision was meant to be prospective because it would not need

[183] *See* Chaidez v. United States ("*Chaidez II*"), 133 S. Ct. 1103 (2013).

[184] *Padilla*, 559 U.S. at 360.

[185] *See infra*, BACKGROUND, section C. *See also* N.Y. Times, *Subject to Deportation*, N.Y. TIMES OPINION PAGES, Nov. 1, 2012, *available at* http://www.nytimes.com/2012/11/02/opinion/the-supreme-court-on-deportation-law.html?_r=0.

[186] *See also* Callaghan, *supra* note 48, at 703 (noting that of sixty-one courts, both state and federal level, to rule on the issue, thirty-eight determined that the *Padilla* rule was retroactive).

to address claims that would not exist under that interpretation.[187] While *Padilla's* language may not mean much now because of the subsequent *Chaidez* decision, it does tend to show that the Court may have intended the rule to apply to a more people. At the very least, the *Padilla* decision shows that the Court intended the rule to help out non-citizens and immigrants who faced a particularly harsh penalty for what could be a relatively minor crime.[188]

Additionally, in the *Padilla* case, there were concerns from the government that the ruling would result in a flood of litigation from previously deported non-citizens.[189] This fear turned out to be unfounded, as there were relatively few cases brought in the interim between the *Padilla* and *Chaidez* decisions.[190] Therefore, while the same fear of increased litigation is present in *Chavarria*, it would also likely be unfounded if the Seventh Circuit had ruled the opposite way. This does not mean that the Seventh Circuit ruled incorrectly, just that there likely would not be a flood of litigation from immigrants trying to return to the country based on that decision.

CONCLUSION

Because the facts of *Padilla* were analogous to the facts of Chavarria's case, the Seventh Circuit had no choice but to rule the way it did. Holding that affirmative misadvice is analyzed strictly under *Strictland*, and not *Padilla*, would have been directly at odds with the Supreme Court's decision in *Padilla v. Kentucky*. However, the purpose of *Padilla* is frustrated by the subsequent case, *Chaidez II*. Similarly, *Chavarria*, while in accordance with precedent, impedes *Padilla's* objective – giving noncitizens the constitutional protection of the Sixth Amendment when they are unaware and uninformed of the risks of pleading guilty to a wide range of criminal charges.

[187] Callaghan, *supra* note 48, at 730-31.
[188] *Padilla*, 559 U.S. at 360.
[189] *Padilla*, 559 U.S. at 369.
[190] Callaghan, *supra* note 48 at 729-730.